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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 265

IN THE MATTER OF THE APPLICATION OF
BARBARA F. BERLIN,

Respondent,

For the Custody of JONATHAN BERLIN and
RICHARD BERLIN,

—against—

JOSEPH G. BERLIN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE MATTER OF THE APPLICATION OF
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—against—

JOSEPH G. BERLIN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Petitioner, Joseph G. Berlin, prays that a Writ of Certiorari issue to review (a) an order of the New York Court of Appeals, dated December 29, 1967, as amended, which modified an order of the Supreme Court of the State of New York, Appellate Division, Second Department, made on July 10, 1967; and (b) an order of the New York Court of Appeals made on April 10, 1968, to the extent that it denied a rehearing of the aforesaid appeal to that Court.

The Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 21 N.Y.2d 371, 288 N.Y.S.2d 44 and 235 N.E. 2d 109. That opinion and the order and

remittitur as amended, are printed in the Appendix at pages 1a to 9a.

The decision of the New York Court of Appeals denying rehearing, denying clarification of its opinion, and granting amendment of its remittitur, is printed in the Appendix at pages 10a and 11a.

The memorandum decision of the Supreme Court, Appellate Division, Second Department, modifying the decision and judgment of the Supreme Court of the State of New York, County of Queens, is reported at 28 A.D.2d 877, and 281 N.Y.S.2d 663, and its decision and order are printed in the Appendix at pages 12a to 19a.

The opinion of the Supreme Court of the State of New York, County of Queens, has not been officially or unofficially reported. Its opinion is printed in the Appendix at page 20a. The interim order and final judgment of that court are printed in the Appendix at pages 21a to 24a.

Jurisdiction

The order of the New York Court of Appeals was entered on December 29, 1967. On March 26, 1968 this Petitioner moved in the Court of Appeals for rehearing, clarification of its opinion, and amendment of the remittitur. On April 10, 1968 the New York Court of Appeals entered an order denying rehearing, denying clarification of its opinion, and granting amendment of the remittitur.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

Questions Presented

1. Does the order of the New York Court of Appeals affirming the award of custody of the parties' two sons to the Respondent, directly contrary to a modified final decree

of divorce of the State of Maryland which awarded custody to the Petitioner, contravene Article IV, Section 1 of the Constitution of the United States under the circumstances of this case, including in particular (a) the Respondent's unsuccessful challenge in Maryland to the jurisdiction of that state to modify the divorce decree, (b) the absence of changed circumstances since the Maryland award, and (c) the Respondent's repeated contempts of the Maryland courts.

2. Does the order of the New York Court of Appeals affirming a direction that the Petitioner pay for the support of his sons, contrary to the modified Maryland decree rescinding the Petitioner's support obligations, contravene Article IV, Section 1 of the United States Constitution in the circumstances of this case, including in particular (a) the Respondent's repeated contempts of the Courts of the State of Maryland, (b) the absence of changed circumstances since the modification of the Maryland decree and (c) the absence of any showing of need for such payments which could support a legitimate overriding public interest in the State of New York prompted by the welfare of these boys.

Constitutional Provisions and Statutes Involved

The questions presented require the interpretation and application of Article IV, Section 1 of the Constitution of the United States, which provides:

> "Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Likewise involved is 28 U.S.C. § 1737 which in pertinent part provides: "Such Acts, records and judicial proceed-

ings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 62 Stat. 243 (1948).

Statement

This case by no means involves the usual proceeding to determine custody based on changed circumstances. As readily appears, the Respondent instituted and prosecuted this proceeding in New York solely to thwart a determination in Maryland that the award of custody to this Petitioner would be in the best interests of his sons.

The parties lived in Maryland subsequent to their marriage in 1954 and prior to their divorce in that State upon the petition of the Respondent, in September, 1960 (22, 92).* The divorce decree (92), which incorporated an agreement of the parties (94), awarded custody to the Respondent. The boys are now 14 and 15½ years of age (22). The decree awarded the Respondent a lump sum and other considerations in full settlement of her own property rights and future support, and in addition provided for monthly payments for the support of the children "subject to further order of this Court".

About six months after the divorce, the Respondent removed the children to New York contrary to the decree as subsequently held by the Maryland courts (107, 117). Thereafter, the Respondent promptly and repeatedly deprived the Petitioner of his visitation rights. As a result, she was several times adjudicated in contempt of the Maryland courts. Those adjudications are set forth and summarized in the several orders and opinions rendered by those courts (107, 109, 113).

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* Unless otherwise indicated, numerical references are to pages of the Record On Appeal in the New York Court of Appeals.

The last such adjudication was made by the Montgomery County Circuit Court in August, 1963, after the Respondent wilfully refused to appear in Maryland although personally served with process in New York. Prior to that adjudication, this Petitioner also applied to the Court for a change in custody. The Respondent likewise ignored notice of that proceeding and refused to appear. As a result, the order adjudicating her in contempt also directed the Montgomery County Circuit Court Probation Department to investigate into the circumstances surrounding this Petitioner's request for a change in custody (109).

Although a change in custody had not yet been ordered, the Respondent instituted the within proceeding in New York in September, 1963 after she learned of this Petitioner's application for custody. As appears from her petition in New York, this proceeding was brought solely for the purpose of enjoining the removal of the children from New York State (11-13). On October 29, 1963, upon the basis of its Probation Department's investigation and report, the Montgomery County Circuit Court made an order modifying the original divorce decree (1) by awarding custody to this Petitioner, finding that such award was in the "best interests and welfare of said children", and (2) by rescinding the provisions of the decree relative to the support of the children, subject to the further order of the Court (110). The same day this Petitioner went to New York to obtain the physical custody of his sons, but he was prevented first by the Respondent and her present husband (57-59), and the next day by an *ex parte* order obtained by the Respondent's attorneys (121).

The Respondent did not pursue her New York proceeding which was then scheduled for a hearing the following day (121), but instead elected to challenge the jurisdiction and decision of the Maryland courts by direct application to the Montgomery County Circuit Court. On November 27, 1963 she made her application to vacate the order of Octo-

ber 29, 1963, and her application was denied in a lengthy opinion by the Montgomery County Circuit Court on May 26, 1964 (113-117). She pressed her attack to the Court of Appeals of the State of Maryland which, on May 26, 1965, rejected her contentions that the Montgomery County Circuit Court lacked jurisdiction to award custody to this Petitioner (107). In its lengthy opinion, the Maryland Court of Appeals also considered and rejected the Respondent's contention on the merits that the change in custody was erroneous in the circumstances of this case. That Court found, among other things, that this Petitioner was a "fit and proper person to have custody of the children", and in a display of abundant fairness to the Respondent noted she would not be foreclosed from seeking visitation rights or, at an appropriate time, reapplying for custody. The Respondent did not seek or obtain further review by this court.

The Respondent immediately revived her dormant New York proceeding by bringing it on for trial less than a month after her defeat in Maryland. Her New York petition was not amended so as to allege any purported change in circumstances since the Maryland modification, or in any other respect. Neither did it request an award for child support. The trial was brief, and was marked from the outset by the trial judge's attempts to persuade this Petitioner to waive his claim to custody in favor of the Respondent—a New York resident (34-37, 75-76). The Respondent's proof related almost exclusively to the irrelevant difficulties between these parties prior to the modification of the Maryland decree. This Petitioner's proof was mostly appropriate rebuttal. It was also established that the Respondent lived in an apartment in Forest Hills, Queens County, with her sons and her second husband whom she married on June 20, 1963 (prior to the Maryland custody change) (22-24, 44); that she had been seeing a psychiatrist (25); and that her second husband was employed in a managerial capacity and was supporting the two children (48, 51). This Petitioner, on the other hand,

established his remarriage (62), and showed generally that he lived in comfortable circumstances with ample room and a strong desire for his sons (54, 64).

The trial judge did not consult the children, and no other investigation was made concerning their circumstances or welfare. No proof was adduced tending to show that the children would be adversely affected by compliance with the Maryland decree. No showing was made that this Petitioner is unfit to have custody, and indeed his fitness has been affirmatively found by all the courts in Maryland and New York. And although all the New York courts below wrote opinions, none was able to point to a single fact occurring subsequent to the Maryland modification which could reasonably be characterized as a change in circumstances. The New York Court of Appeals merely noted the Respondent's continuous custody, a fact forcefully brought home to the Maryland courts, and then *presumed* that the boys have adjusted and that adherence to the Maryland decree *"could* have a disruptive effect" upon them. The New York Court of Appeals manifestly disagreed with the Maryland courts, on the basis of the same facts.

The federal questions sought to be reviewed here were raised by this Petitioner, as follows: (a) In the court of first instance, by the affirmative defense alleged in this Petitioner's verified answer (14-15), and by motions to dismiss the petition during the course of trial (74-75, 89). The trial court reserved decision when the motion was first made (75), but denied the motion when it was made the second time (89). (b) In the Supreme Court, Appellate Division, Second Department, by contending that the award of custody and support to the Respondent contravened Article IV, Section 1 of the Constitution of the United States. That Court, as shown by its memorandum decision (Appendix, pages 12a-18a), rejected the Petitioner's contentions. (c) In the New York Court of Appeals, by contending that the award of custody and support to the Respond-

ent contravened Article IV, Section 1 of the Constitution of the United States. As shown by the Court's opinion and its remittitur, as amended (Appendix, pages 1a-11a), that Court rejected the Petitioner's contentions.

Reasons For Granting The Writ

In the past this Court has found it unnecessary to decide this question of crucial national importance, namely, whether and to what extent one state is bound to give full faith and credit to the custody decree of a sister state rendered with jurisdiction, in the absence of changed circumstances affecting the welfare of the child. *New York ex rel. Halvey* v. *Halvey,* 330 U.S. 610 (1947); *May* v. *Anderson,* 345 U.S. 528 (1953); *Kovacs* v. *Brewer,* 356 U.S. 604 (1958); *Ford* v. *Ford,* 371 U.S. 187 (1962). That question is squarely presented here.

The jurisdiction of Maryland to modify its decree by awarding custody to the petitioner is beyond challenge. *Sherrer* v. *Sherrer,* 334 U.S. 343 (1947); see, also, *Durfee* v. *Duke,* 375 U.S. 106 (1963); *Johnson* v. *Muelberger,* 340 U.S. 581 (1950). Nor is there any question concerning the effect which a Maryland court would give to that modification; the Maryland Court of Appeals specifically refused to disturb it, and it is established Maryland law that a custody award is *res judicata* upon the facts presented and will not be disturbed in the absence of a factual showing of changed circumstances which require a different disposition for the welfare of the child. *Cornwell* v. *Cornwell,* 244 Md. 674, 680 (1966); *Winter* v. *Crowley,* 231 Md. 323, 331 (1962); *Naylor* v. *Naylor,* 217 Md. 615, 631 (1958); *Butler* v. *Perry,* 210 Md. 332, 342 (1955); *Pitts* v. *Pitts,* 181 Md. 182, 193 (1942); *Tull* v. *Tull,* 122 Md. 213. 218 (1937). Clearly, there is no such showing of changed circumstances in this record. Even if the New York Court of Appeals had so implied, this Court would not be bound inasmuch as there is no evidentiary basis.

Williams v. *North Carolina,* 325 U.S. 226, 236-(1944); see, also, *Whitus* v. *Georgia,* 385 U.S. 545, 550 (1967); *Ker* v. *California,* 374 U.S. 23, 34 (1963); *Norris* v. *Alabama,* 294 U.S. 587, 589-590 (1934).

Partially as a result of an erroneous reading of this Court's opinion in *May* v. *Anderson, supra,* the Court of Appeals unnecessarily but flatly stated in *Bachman* v. *Mejias,* 1 N. Y. 2d 575, 580 (1956) that "The full faith and credit clause does not apply to custody decrees". That holding marked the Court's departure from prior New York law that a custody decree of a sister state, made with jurisdiction, is entitled to full faith and credit unless "circumstances have so changed that the welfare of the child demands a shift of custody". *Ansorge* v. *Armour,* 267 N. Y. 492, 501 (1935). What was forceful dictum in *Bachman* v. *Mejias, supra,* became a necessary holding on the facts of the instant case. Particular significance may be attached to the fact that in 1936 the New York Court of Appeals squarely held that a Maryland custody decree was entitled to full faith and credit in New York in the absence of changed circumstances. *People ex rel. Tull* v. *Tull,* 270 N. Y. 619 (1936). But the Court of Appeals has now said in this case that a custody decree made in Maryland, or for that matter anywhere else, is now entitled only to discretionary recognition which, in the words of the Court, does not preclude "relitigating the issue" (Appendix, page 5a). This rule has more recently been acknowledged in *Matter of Metz* v. *Morley,* 29 A. D. 2d 462 (4th Dep't, 1968), and is understood to be the New York rule by legal commentators. Rodgers, *Due Process—Full Faith and Credit,* 67 CAL. L. REV. 1363, 1369, fn. 43 (1967); Currie, *Full Faith and Credit, Chiefly To Judgments: A Role for Congress,* 1964 The Supreme Court Review 89, 115; 13 VILL. L. REV. 406, 410 (1968). In *Kovacs* v. *Brewer, supra* at page 608, this Court observed New York's drift in this direction.

It is the Petitioner's position that there is no basis in the precedents of this Court, or in the history and purpose of the Full Faith and Credit clause, or in any national policy

for holding that one state may deprive the valid custody decree of a sister state of the effect it would receive in the rendering state, absent changed circumstances—particularly upon the application of one who has shown flagrant disrespect for the lawful mandates of the sister state. The instability and insecurity generated by the policy of discretionary recognition of such decrees can only be harmful to children and their parents, and such a policy can only foster disrespect for the Courts. A clear national policy of appropriate adherence to valid decrees would do no more than prevent supervision by one sovereign over another and the provincialism which so often lays claim to a superiority of wisdom.

This case is, of course, of paramount importance to the Petitioner. But it is believed that its larger importance lies in its capacity for contributing to the clarification nationally of a recurrent and vexing question for which there is the clearest need.

Prior to this Court's decisions in *Halvey, Anderson, Brewer* and *Ford, supra,* there appeared to be near unanimity among the various jurisdictions that the Full Faith and Credit clause applies to valid custody decrees, absent a factual demonstration of a change in circumstances requiring a custody change. Stansbury, *Custody and Maintenance Law Across State Lines,* 10 LAW AND CONTEMPORARY PROBLEMS, 819, 828 (1943). Since those decisions, interpreted by some as suggesting the inapplicability of the clause, the courts of various states in increasing numbers have adopted the view that it is constitutionally permissible to relitigate the custody question already disposed of by a sister state, on the theory that the child's welfare as evaluated by the second reviewing state should govern. Ratner, *Child Custody in a Federal System,* 62 MICH. L. REV. 795, 815 (1964); Ehrenzweig, *Interstate Recognition of Custody Decrees,* 51 MICH. L. REV. 345, 352-355 (1953); Comment, *The Puzzle of Jurisdiction in Child Custody Actions,* 38 U. COL. L. REV. 541, 543 (1966); Note 53 KY. L. J. 799, 804 (1965); 13 VILL L. REV. 406, 409 (1968). The cited works and authors also point up that many state courts do apply

the Full Faith and Credit clause in the absence of changed circumstances. But of the courts who do, some merely use the phrase as an excuse for avoiding the effect of the foreign decrees in order to serve the resident of the forum. *The Puzzle of Jurisdiction in Child Custody Actions, supra,* at pages 547-548 and fn. 37; Ehrenzweig, *Interstate Resolution of Custody Decrees, supra,* at page 352. And some courts candidly confess there is doubt as to the extent of the protection afforded by the Full Faith and Credit clause. See, *e.g., Butler* v. *Perry,* 210 Md. 332, 342 (1955) (referring to *New York ex rel. Halvey* v. *Halvey* and *May* v. *Anderson, supra*). On facts strikingly similar but less compelling than those in this case, the highest court of Illinois has given full faith and credit to a modification of a custody decree by a Massachusetts court. *People ex rel. Koelsch,* 3 Ill. 2d 483 (1954).

The national disarray with regard to the question under discussion is evident from a reading of the commentators hereinabove referred to, and others as well. See also *Ford v. Ford; Full Faith and Credit to Child Custody Decrees?* 73 YALE L. J. 134 (1963); EHRENZWEIG ON CONFLICT OF LAWS, §§ 87-89 (1962). The New York rule of discretionary recognition, adopted much earlier in Kansas and known as the "Kansas Rule", has been severely criticized by some and endorsed by others. *Compare* Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Curry and a Proposed Uniform Act,* 38 So. CAL. L. REV. 183, 188 (1965) and Note, 81 U. Pa. L. REV. 970, 973 (1933), *with* Note, *Jurisdiction in Custody Cases—Full Faith and Credit,* 53 KY. L. J. 799, 805-806 (1965). Those urging the applicability of the Full Faith and Credit clause stress its partiular relevance to custody litigation, anticipating such beneficial results as the enhancement of the dignity of courts, the better likelihood of the appearance of both parents thereby assuring fuller review of the facts, and a reduction in litigation. Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Curry and a Proposed Uniform Act, supra,* at pages 191-192; see also *The Puzzle of Jurisdiction*

in Child Custody Actions, supra. While there is disagreement as to whether the rampant confusion should be resolved by this Court, or by Congress, or by uniform act adopted by the several states, there is accord on the proposition that something should and must be done to settle the question which this Petitioner asks this Court to review.

This case is one step—perhaps even several—beyond the usual situation. For here the Respondent repeatedly and maliciously violated the orders and mandates of the Maryland Courts, and invoked the jurisdiction of the Courts of New York solely for the purpose of annulling the decree of a sister state. Although there is considerable diversity of view among the several states as to the applicability of the Full Faith and Credit clause in the absence of contumacious conduct, it is clearly the prevailing view that in such circumstances courts will not add to the insult by their interference but will instead remand the party petitioning for change to the original forum. EHRENZWEIG, *op. cit. supra,* at pages 293-297; Ehrenzweig, *Interstate Recognition of Custody Decrees, supra,* at pages 363-369.

The award of custody to the Petitioner by the Montgomery County Circuit Court was made more than two months after the adjudication of the Respondent's last contempt of that Court, was predicated upon its Probation Department's investigation conducted in the meanwhile, and was specifically sustained by the Maryland Court of Appeals. Nothing has happened since of consequence that was not before that Court, although the Respondent had ample opportunity to make such showing. The denial of Full Faith and Credit here was a flagrant repudiation of the integrity and judgment of the Maryland courts which, by a long line of cases, are governed by the nationally accepted criterion that the best interests of the child control in these matters. *Ferster v. Ferster,* 237 Md. 548, 550-551 (1965); *Wallis v. Wallis,* 235 Md. 33, 36 (1964); *Glick v. Glick,* 232 Md. 244, 248 (1963); *Mason v. Mason,* 228 Md. 387,

389 (1962); *Griggs v. Griggs,* 228 Md. 539, 541 (1962); *Bray v. Bray,* 225 Md. 476, 481 (1961); *Hild v. Hild,* 221 Md. 349, 351 (1960); *Burns v. Bines,* 189 Md. 157, 162-163 (1947). There is no reason why the courts of New York should not be able to assume, with confidence, that the courts of a sister state will act with wisdom and sincerity in all matters pertaining to the welfare of children. *Sampsell v. Superior Court,* 32 Cal. 2d 763, 779 (1948); *Miller v. Schneider,* 170 S.W.2d 301, 303 (Tex. Civ. App., 1943). The Montgomery County Circuit Court is no exception to the rule, as was specifically held in *Brown v. Stevens;* 331 F.2d 803, 805 (1964).

The "tug of war" between sister states in cases such as this has been aptly described as a "grotesquery". *Sharpe v. Sharpe,* 77 Ill. App. 2d 295 (1966). The Court in that case said: "To paraphrase Mr. Justice Jackson's statement in Estin v. Estin, 334 U.S. 541, if there is one thing the people are entitled to expect from their lawmakers, it is rules of law that will enable children, or those acting for them, to tell to whom they belong, and if they don't know, where they can find out." (at page 297). Justice Jackson once said: "The whole issue of faith and credit as applied to the law of domestic relations is difficult, and the books of the Court will not be closed on it for a long time, if ever." Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COL. L. REV. 114 (1945). This Court will obviously not close its books if it reviews this case, but at least it might turn one very important page.

With regard to the allowance by New York of support for the children contrary to the modified Maryland decree, a reversal by this Court on the custody issue should the writ issue would also require the reversal of the award of support. Beyond that, however, the award of support was unconstitutional for separate and additional reasons. Sup-

port was withdrawn by the Montgomery County Circuit Court solely because of the Respondent's contempts, and this Petitioner's rights are now fixed by the modified final divorce decree. Whatever the future may hold, it seems clear that the modified decree is unalterable, or should be, by the action of any Court other than the Montgomery County Circuit Court. The Respondent can hardly purge herself anywhere else. Nor can the State of New York lay claim to any overriding domestic public policy consideration arising out of an obligation to secure the health and welfare of its resident minors. There is not the slightest showing of necessity for support by this Petitioner. Accordingly, it is respectfully submitted that New York's award of support was unconstitutional and should be reversed. *Yarborough v. Yarborough,* 290 U.S. 202 (1933); See also, *Johnson v. Muelberger, supra; Esenwein v. Pennsylvania,* 325 U.S. 279 (1944); Stansbury, *Custody and Maintenance. Law Across State Lines, supra,* at page 832.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

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APPENDIX

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STATE OF NEW YORK

COURT OF APPEALS

IN THE MATTER OF THE APPLICATION OF
BARBARA F. BERLIN,
Respondent-Appellant,

for the Custody of JONATHAN BERLIN and
RICHARD BERLIN,

VS.

JOSEPH G. BERLIN,
Appellant-Respondent.

KEATING, J.:

Joseph and Barbara Berlin were married on February 14, 1954 in the state of Maryland. They resided there as husband and wife until September 30, 1960 when a decree of divorce was entered by a Maryland Court. The divorce decree incorporated and confirmed a property and custody agreement made by the parties which awarded custody of the children of the marriage, Jonathan and Richard, to Barbara Berlin and granted visitation rights to Joseph.

The agreement provided that "the wife has the privilege of removing the children from this area." About six months after the decree was entered, Mrs. Berlin took the children, then 6 and 4 years of age respectively, to New York City where they have resided ever since.

Following the removal to New York, difficulties with regard to visitation rights of the father arose. Several

orders were granted, at the behest of Mr. Berlin, by the Maryland courts adjudging Mrs. Berlin to be in contempt of court for interfering with the father's visitation rights. On October 29, 1963, at the request of the father, the Maryland courts awarded custody of the children to him. The order awarding custody recited that a report had been filed by the Montgomery County Probation Department; that the mother had been adjudged in contempt of court and had failed to purge herself of the contempt; and that the best interest and welfare of the children would be served by awarding custody to the father.

Following the entry of this decree, the mother appeared in the Maryland proceeding and moved to vacate the decree on the grounds that (1) the Maryland courts lacked jurisdiction over the subject matter, (2) that she was denied due process for lack of notice of the proceedings resulting in the change of custody, and (3) that the lower court erred in changing the award of custody. All of these contentions were ultimately rejected by the Maryland Court of Appeals. The court noted, however, that "the mother is not foreclosed from reapplying for [the] custody [of the children]."

Following the Maryland determination, several hearings were held in New York Supreme Court on an application by Mrs. Berlin for custody of the children. The proceeding had been commenced prior to Mrs. Berlin's attempt to vacate the prior Maryland decree. The Supreme Court had issued a temporary order restraining Mr. Berlin from removing the children from this state pending its determination of the custody question.

At a hearing which was held on June 22, 1965, testimony was adduced, showing, among other things, that the children had lived all their lives with their mother, were now living and being cared for by their mother and their step-father, and that the only time the children had seen their father since December, 1962 was when he came to

New York, and with the aid of two private detectives, tried forcibly to remove the children from the state.

On September 22, 1966, some three years after the Maryland Courts had awarded custody to the father, Special Term awarded custody of the children to the mother, finding that the welfare and best interest of the children would be served thereby.

In addition, the Court ordered the father to pay $2,500 to the mother for her counsel fees and to pay the mother $60 a week for the children's support, such payments to start as of the date of the hearing in the New York Supreme Court; held that the father's right of visitation should be suspended until he demonstrated that he would not again try to remove the children forcibly from New York; and enjoined him from removing the children from the State.

The Appellate Division affirmed the award of custody and the order requiring the father to pay $60 a week for the support of the children, retroactive to the date of the hearing; gave the father some additional time to pay the arrears, reversed the order for payment of counsel fees; and reversed the award suspending the father's right to visitation and restored the rights he had under the original Maryland decree.

On this appeal the father argues that there is no proof in the record that the circumstances have so changed that the welfare of the children demands a change in the second custody decree and that in any event the Maryland decree is entitled to full faith and credit.

The arguments advanced by the appellant with regard to the award of custody to the mother are clearly without merit. Even if we were to assume—contrary to what we have already held (see *Matter of Bachman* v. *Meijas*, 1 N. Y. 2d 575)—that custody decrees are entitled to the same full faith and credit in this jurisdiction as in the

rendering jurisdiction, the award below would have to be sustained.

It is clear from the opinion of the Maryland Court of Appeals in the very case at bar that the award of custody to the father was subject to modification upon a showing that a change in custody would serve the best interests of the children. This was the basis upon which the second Maryland custody decree, awarding custody to the appellant, was made and it is the precise reason for the action taken by Special Term in the case at bar. We cannot say, upon reviewing the record, that this decision was not supported by the evidence or that, in the three years since the prior Maryland decree was made, the circumstances have not altered sufficiently to justify an examination of the custody question.

Viewing the evidence most favorable to the husband, we have here a situation where both parties are fit to rear the children, although they unfortunately have been unable to subordinate their own conflicts to the welfare of their children. The boys, however, have been in the continuous custody of their mother since the couple's divorce, almost 8 years. They have been attending school in New York and have no doubt established friendships here and adjusted to the difficulties which have been engendered by their parents' marital difficulties. It cannot be said that a change in custody (required by adherence to the prior Maryland custody decree) which could have a disruptive effect on the lives of these young children, is in their best interests. We conclude, therefore, that Special Term was justified in awarding custody to the mother.

There may be times when the courts of this state should be reluctant to exercise the power they have to modify an out of state decree (see e.g. *Matter of Lang* v. *Lang*, 9 A. D. 2d 401 affd. 7 N. Y. 2d 1029). This is especially so where the child is brought into this state for the purpose of avoiding a custody decree recently made by a sister state court. Thus it has been said:

> "It is especially desirable, from the point of view of the child's welfare, that such litigation as this should not be subject to endless repetition. If the matter has been competently litigated, decrees of foreign courts should be given recognition. If the foreign proceedings have taken place in the state where the child habitually lives, not necessarily where it is technically domiciled, it would seem desirable that other state courts decline to use their power merely because of the temporary presence of the child. Upon a change in the child's residence the decree at the former residence should be given full faith and credit, at least as to conditions existing at the time of its rendition, and the one asserting changed conditions should be compelled to show that they are such as to make him more, or another less, fit to have custody of the child." Stumberg, Conflict of Laws, p. 323, 3rd Ed. (1965).

In the case at bar, however, the Maryland order upon which the husband relies was entered some three years prior to the decree in question by a state court whose only significant contact with the children in question was that the parties had chosen to litigate the custody issue there. "A child is not a chattel" (*Matter of Bachman, supra*), however, and, in determining whether to refuse to exercise our discretion to modify a foreign decree such as this, the question should not be, as the appellant suggests, whether a parent is estopped by his participation in a foreign proceeding from relitigating the issue, but rather what, in fact, is in the best interest of the child. Moreover, as we noted earlier, even if *res judicata* effect were to be given to the Maryland decree, at least as to the facts found at the time, no one could seriously argue that, given the time which has elapsed since the prior decree was rendered, the age of these children and the fact that they

never had actually been out of their mother's custody, a New York court or, for that matter, a Maryland court should or would accept as binding the previous finding awarding custody to the father.

Several other issues are raised by Mr. Berlin's appeal as well as the cross-appeal. The first and most significant one relates to the visitation rights of the father and the manner in which they are to be exercised. Special Term's decision that the father's visitation rights be suspended until he demonstrates that he would not attempt to remove the children from this jurisdiction was reversed by the Appellate Division. The Court found that the only time the father had attempted to forcibly remove the children from this state was when he was acting pursuant to the Maryland custody order and that there was no basis for finding that he would now do so. The court, therefore, fixed the visitation rights as they had originally been agreed upon by the parties and incorporated into the divorce decree.

The cross-appellant argues that there are not sufficient safeguards to guarantee the return of the children to New York in the event the father refuses to return the children and again invokes the jurisdiction of the Maryland courts.

We agree with the Appellate Division that Special Term erred in suspending the father's visitation rights. On the other hand, we cannot agree with the court's conclusion that no protective measures are required to insure the return of the children to New York. The very Maryland order, pursuant to which he attempted once to forcibly remove the children from this jurisdiction, is still in effect and, given the bitter emotions which this controversy has evoked, we believe that the case should be remanded for consideration of proper conditions to the exercise of the visitation rights contained in the agreement. Among the conditions which should be considered is the posting of a prior Maryland decree and any other measure the court in its discretion deems necessary. We would note that the

suggested provisions urged by Mrs. Berlin, that the father's visits with the children be limited to New York and then only in the presence of a third party, seems to be unduly harsh and should be adopted only if no other provisions can be made to insure the father's compliance with the orders of the court.

We have examined the remaining arguments raised on the appeal and cross-appeal and find them to be without merit.

The order of the Appellate Division should be modified in accordance with the opinion herein and, as so modified, it should be affirmed with costs to the petitioner.

* * * * *

Order insofar as appealed from by the petitioner modified, with costs, and the matter remitted to Supreme Court, Queens County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Order insofar as appealed from by the respondent affirmed. Opinion by Keating, J. All concur.

Original Remittitur of New York Court of Appeals

No. 461.

IN THE MATTER OF THE APPLICATION OF
BARBARA F. BERLIN,
Respondent-Appellant,

for the Custody of JONATHAN BERLIN and
RICHARD BERLIN,

vs.

JOSEPH G. BERLIN,
Appellant-Respondent.

BE IT REMEMBERED, That on the 4th day of October in the year of our Lord one thousand nine hundred and sixty-seven, Joseph G. Berlin, the appellant-respondent in this cause, came here unto the Court of Appeals, by Corner, Finn, Cuomo & Charles, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Barbara F. Berlin, the respondent-appellant in said cause, afterwards appeared in said Court of Appeals by Brennan, London & Buttenwieser, her attorneys, and also filed a Notice of Appeal.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Wilfred R. Caron, of counsel for the appellant-respondent, and by Helen L. Buttenwieser, of counsel for the respondent-appellant, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court,

Original Remittitur of New York Court of Appeals

insofar as appealed from by the petitioner-respondent-appellant, be and the same hereby is modified, with costs, and the matter remitted to Supreme Court, Queens County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Order, insofar as appealed from by the defendant-appellant-respondent, affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be modified and affirmed &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 29, 1967.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

State of New York Court of Appeals.

Order Denying Rehearing and Granting Amendment of Remittitur of New York Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of April A. D. 1968.

Present: HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 357

IN THE MATTER OF THE APPLICATION OF
BARBARA F. BERLIN,
Respondent-Appellant,

for the Custody of JONTHAN BERLIN and
RICHARD BERLIN,

VS.

JOSEPH G. BERLIN,
Appellant-Respondent.

A motion for reargument and to clarify the opinion and to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant-respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Order Denying Rehearing and Granting Amendment of Remittitur of New York Court of Appeals

ORDERED, that the said motion, insofar as it seeks re-argument and clarification of the opinion, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Appellant-respondent contended that the award of custody and support made to the respondent-appellant under the circumstances of this case contravened Article IV, Section 1, of the Constitution of the United States. The Court of Appeals held that Article IV, Section 1, of the Constitution of the United States was not violated.

AND the Supreme Court of Queens County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

RAYMOND J. CANNON,
Clerk.

Memorandum Decision of the Supreme Court, Appellate Division, Second Department

Order of the Supreme Court, Queens County, dated May 13, 1966, which decreed that, *nunc pro tunc* as of June 22, 1965, the petitioner was temporarily awarded custody of the two children, affirmed, without costs.

Judgment of said Court, dated September 23, 1966, modified on the law and the facts and in the exercise of discretion by: (1) striking out the second decretal paragraph, denying respondent rights of visitation, and by substituting therefor provisions fixing the respondent's rights of visitation of his children in accordance with the provisions therefor in the agreement, dated September 21, 1960, which was incorporated into the Maryland divorce decree, dated September 30, 1960; (2) striking out the third decretal paragraph, enjoining removal of the children from petitioner's custody or from this State; (3) amending the fourth decretal paragraph, as to support of the children, by directing payment of the arrears in two equal instalments; and (4) by striking out the fifth decretal paragraph, awarding a counsel fee. As so modified, judgment affirmed, without costs. The time for payment of the instalments of arrears is extended until 30 and 90 days, respectively, after entry of the order hereon.

The implied finding that the respondent would remove the children from this jurisdiction and would not return them to this jurisdiction if he were given rights of visitation of his children is reversed and a contrary finding is made.

The proceeding herein is one pursuant to article 4 of the CPLR, instituted by an order requiring appellant to show cause why a judgment should not be entered making the children wards of the court, awarding custody thereof to the petitioner, restraining their removal from this State and determining the appropriate conditions for the exercise of the appellant's rights of visitation.

Memorandum Decision of the Supreme Court, Appellate Division, Second Department

The parties resided in Maryland when a divorce action was instituted therein, although the petitioner moved to Washington, D. C. before the divorce decree was granted to her on September 30, 1960. *Inter alia,* an agreement between the parties dated September 21, 1960 and the divorce decree into which it was incorporated, awarded custody of the children to the petitioner, fixed specific rights of visitation, dependent on whether the children were living in or outside of the Washington area, awarded $100 a week for the support of the children, awarded $3500 to petitioner's attorneys as counsel fees and arrived at a property settlement, intended to settle all rights between the parties accruing out of the marriage, insofar as they might be settled by law.

Under Maryland law, a final property settlement between a husband and wife may be incorporated into a divorce decree. It will not be regarded as alimony and it may not be modified thereafter by the court (Schroeder v. Schroeder, 234 Md. 462; Grossman v. Grossman, 234 Md. 139). Under Maryland law, a wife has no right to obtain an award of a counsel fee after a final decree is entered (Tome v. Tome, 180 Md. 31; Berman v. Berman, 191 Md. 699).

The agreement, by providing for different rights of visitation, dependent on whether the children were residing in or outside the Washington area, authorized the petitioner to move from Washington with the children. She moved to New York with the children to rejoin her parents and the appellant moved to Washington, D. C. Bitter disputes arose between the parties as to appellant's visitation rights which the petitioner had denied him. Various orders were entered in the Maryland court which, *inter alia,* authorized appellant to suspend payments for the support of the children until petitioner purged herself of contempt in denying ap-

pellant's visitation rights. Only a few of said orders will be discussed.

By an order, dated July 30, 1963, the Maryland court awarded custody of the children to appellant unless the petitioner showed cause to the contrary on August 23, 1963. By an order, dated August 26, 1963, the Maryland court adjudged petitioner guilty of contempt, directed the sheriff to take and detain her until she purged herself of contempt and directed the Montgomery County Circuit Court Probation Department to make an investigation into the circumstances surrounding the requested change of custody.

By an order to show cause, dated September 25, 1963, returnable October 11, 1963, the petitioner instituted the instant proceeding in New York.

On October 29, 1963, after a report had been filed by the Montgomery County Probation Department of Maryland, which did not see or interview the petitioner or the children, and, in the absence of the petitioner, the Maryland court modified the final divorce decree by awarding the custody of the children to appellant and rescinding the provisions of the decree relative to the support and maintenance of the children, subject to the further order of the court. The decree was so modified because of the petitioner's interference with appellant's rights of visitation. On or about October 30th, 1963, appellant came to New York with a private detective to take custody of the children as authorized by the Maryland divorce decree, as modified on October 29, 1963, but he left this State without the children. On October 30, 1963, the petitioner obtained an *ex parte* order in the New York proceeding enjoining appellant from removing the children from the petitioner's custody or from this State, pending the hearing in the New York proceeding.

Memorandum Decision of the Supreme Court, Appellate Division, Second Department

The petitioner moved in the Maryland action to vacate the order of October 29, 1963, claiming in substance that neither the parties nor the infants resided in Maryland and that, therefore, the court lacked jurisdiction over the children. The motion was denied or dismissed on or about May 26, 1964. The petitioner appealed and, on May 26, 1965, the Court of Appeals of Maryland affirmed, pointing out that the petitioner was not foreclosed from seeking the right to visit the children or, when appropriate, reapplying for custody.

Then the instant proceeding pursuant to article 4 of the CPLR, which had been dormant, was revived. Appellant filed an answer alleging, *inter alia,* that the petitioner was prosecuting this proceeding for the purpose of having this court deny full faith and credit to the court of another State.

The proceeding resulted in a judgment which (1) awarded custody of the children to the petitioner, (2) decreed that appellant be denied rights of visitation until such time as he demonstrated that he was "willing to desist from his forcible attempts to remove the children from this jurisdiction and provide some plan embodying safeguards for petitioner in that regard", (3) decreed that all persons under the father's control be enjoined from removing the children from the petitioner's custody or from this State, (4) ordered appellant to pay $60 a week for the support of the two children, retroactive to June 22, 1965, with the arrears payable within 10 days after service of a copy of the judgment with notice of entry, and (5) ordered the respondent to pay $2500 to the petitioner for counsel fees.

In our opinion, when the relevant facts are considered, including the facts that the petitioner was authorized, by the agreement and the divorce decree, to move to New York

with the children, the appellant resided in Washington, D. C. at the time of the hearing in New York; both parties have remarried and both appear to be qualified to raise the children; the Montgomery County Circuit Court Probation Department of Maryland did not interview the petitioner or the children prior to the modification of the divorce decree, and the petitioner was deprived of custody of the children and of support of the children, not because she was an unfit mother but because she was in contempt of court for depriving appellant of his rights of visitation, it should not be held that Special Term lacked jurisdiction or improvidently exercised its discretion by coming to a determination in conflict with the determination of the Maryland courts (*cf.* Matter of Bachman v. Mejias, 1 N.Y. 2d 575).

In our opinion, Special Term did not commit reversible error in awarding custody of the children to the petitioner (*cf.* Matter of Bachman v. Mejias, *supra;* Matter of Strecker v. Strecker, 10 A.D. 2d 312; but see Eskin v. Eskin, 26 A.D. 2d 680). Since she resides in New York, she may be punished in New York for contempt of court if she violates rights of visitation. We think that the provisions depriving the respondent conditionally of his rights of visitation and enjoining the removal of the children from this State were not justified by the record. When the father came to New York on or about October 30, 1963, to remove the children from this State, he was armed with a decree of the Maryland Court giving him custody of the children, subject to the further order of the court. In our opinion, the implied finding that the father would remove the children unlawfully from this State or keep them unlawfully out of this State, if he were granted rights of visitation, is not supported by the proof and a contrary finding is made.

Memorandum Decision of the Supreme Court, Appellate Division, Second Department

Insofar as support and counsel fees are concerned, there is statutory authority for the award of support in this proceeding (Domestic Relations Law, § 240) and for an award of counsel fees (Domestic Relations Law, § 237, subd. 6; see Practice Commentaries under section 240 of McKinney's Domestic Relations Law, pp. 361-362, and under section 237 thereof, p. 293).

It is our view that, in the circumstances herein, Special Term did not improvidently exercise its discretion in awarding support although we are modifying said award to give the appellant some time to pay the arrears.

As to counsel fees, no request was made therefor until the conclusion of the oral proof, when petitioner's trial counsel said that she had not made any request therefor but would submit such a request. Apparently no request was submitted. In our opinion, the record does not justify such an award under the circumstances.

Brennan, Acting P. J., Hopkins, Benjamin, Munder and Nolan, JJ., concur.

Order of the Supreme Court, Appellate Division Second Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 10, 1967.

HON. ARTHUR D. BRENNAN,
Acting Presiding Justice,
HON. JAMES D. HOPKINS,
HON. A. DAVID BENJAMIN,
HON. FRED J. MUNDER,
HON. GERALD NOLAN,
Justices.

IN THE MATTER OF BARBARA F. BERLIN,
Petitioner-Respondent,

v.

JOSEPH G. BERLIN,
Appellant.

ORDER ON APPEAL FROM ORDER AND JUDGMENT

In the above entitled cause, the above named Joseph G. Berlin, a party, having appealed to this court from an order of the Supreme Court, Queens County, dated May 13, 1966, which decreed that *nunc pro tunc* as of June 22, 1965, the petitioner was temporarily awarded custody of the two children; and from a judgment of said court, dated September 23, 1966; the said appeal having been argued by Wilfred R. Caron, Esq., of counsel for the appellant, and by Helen L. Buttenweiser, Esq., of counsel for the respondent, and due deliberation having been had thereon;

Order of the Supreme Court, Appellate Division Second Department

and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed, without costs; and it is further

ORDERED that the judgment appealed from is hereby modified on the law and the facts and in the exercise of discretion by: (1) striking out the second decretal paragraph, denying respondent rights of visitation, and by substituting therefor provisions fixing the respondent's rights of visitation of his children in accordance with the provisions therefor in the agreement, dated September 21, 1960, which was incorporated into the Maryand divorce decree, dated September 30, 1960; (2) striking out the third decretal paragraph, enjoining removal of the children from petitioner's custody or from this State; (3) amending the fourth decretal paragraph, as to support of the children, by directing payment of the arrears in two equal instalments; and (4) by striking out the fifth decretal paragraph, awarding a counsel fee; and, as so modified, said judgment is unanimously affirmed, without costs.

The time for payment of the instalments of arrears is extended until 30 and 90 days, respectively, after entry of this order; and it is further

ORDERED that the implied finding that the respondent would remove the children from this jurisdiction and would not return them to this jurisdiction if he were given rights of visitation of his children is hereby reversed and a contrary finding is made.

Enter:

HERMAN M. POGUL,
Clerk of the Appellate Division.

Opinion of Supreme Court, State of New York, County of Queens

PAUL BALSAM, J.:

This is an application by the petitioner-mother (1) for custody of Jonathan Berlin and Richard Berlin, the two infant issue of her prior marriage, (2) for a declaration that said infants are the wards of this court and (3) to restrain the respondent, her former husband, from removing said infants from the jurisdiction of this court.

Upon the hearings held herein and the facts presented thereat this court concludes that the best interests of the children would be served by awarding their custody to the petitioner.

Accordingly, the application is granted (*Matter of Bachman* v. *Mejias*, 1 N.Y.2d 575), custody of the two children is awarded to the petitioner and the respondent is directed to pay the sum of $60 per week support retroactive to the date of the original hearing held herein. The respondent is denied visitation rights until such time as he demonstrates to this court that he is willing to desist from his forcible attempts to remove the children from this jurisdiction and provide some plan embodying safeguards for the petitioner in that regard. Respondent may then apply to this court for a modification.

The respondent and all other persons including those acting under his direction and control, directly or indirectly, are enjoined from removing said children from petitioner's custody or from this State.

Petitioner is awarded counsel fees in the sum of $2500.

Settle judgment.

PAUL BALSAM,
J. S. C.

Judgment of the Supreme Court, State of New York, County of Queens

Present: HON. PAUL BALSAM,
Justice.

The issues in the above-entitled proceeding brought pursuant to Article 4 CPLR for the custody of the children herein, a declaration that said children are wards of the Court and an order restraining the removal of said children from this state, having duly come on to be heard before Mr. Justice Balsam without a jury at a Special Term, Part I, of this Court on the 22nd day of June, 1965, respondent herein having duly appeared by his attorneys, Greenwald, Kovner, Goldsmith & Berger, on that date, and a supplemental hearing having taken place on May 10, 1966, respondent herein having duly appeared on that date by Corner, Finn, Froeb & Charles, having been substituted as attorneys for respondent, and the petitioner having duly appeared on those dates by her attorneys, Brennan, London & Buttenweiser, and the proofs of both parties having been adduced and their respective counsel having been heard, and the Court after due deliberation on the 19th day of August, 1966 having duly made and filed a decision in writing and directing the settlement of judgment, it is

ORDERED AND ADJUDGED, that custody of the children herein be awarded to petitioner, and it is

FURTHER ORDERED AND ADJUDGED, that respondent be denied visitation rights until such time as he demonstrates to this Court that he is willing to desist from his forcible attempts to remove the children from this jurisdiction and provide some plan embodying safeguards for petitioner in that regard, and it is

FURTHER ORDERED AND ADJUDGED, that respondent and all other persons including those acting under his direction

and control, directly or indirectly, be enjoined from removing said children from petitioner's custody or from this state, and it is

FURTHER ORDERED AND ADJUDGED, that respondent pay to petitioner the sum of $60.00 a week for the support of the two children retroactive to June 22, 1965, and that said weekly payments are to be paid by check or money order at the residence of the petitioner or at such other place as she may designate in writing and that there is now due and owing to petitioner the sum of $3,840.00 which is due and payable within ten days after service of a copy of this judgment with notice of entry thereof, and it is

FURTHER ORDERED, that respondent pay to the petitioner as and for counsel fees the sum of $2,500.00 by check or money order at the office of her attorney within ten days after service of a copy of this judgment with notice of entry thereof.

Enter

/s/ PAUL BALSAM,
J. S. C.

Granted
Sep. 23, 1966
PAUL LIVOTI
Clerk

PAUL LIVOTI,
Clerk.

Interim Order of the Supreme Court of the State of New York, County of Queens

Present: HON. PAUL BALSAM,
Justice.

A proceeding having been commenced by Petitioner, through her attorneys, Brennan, London & Buttenwieser, by means of an Order to Show Cause dated September 25, 1963, why a judgment should not be made and entered making Jonathan Berlin and Richard Berlin Wards of the Court; awarding custody of Jonathan Berlin and Richard Berlin to their mother, Barbara F. Berlin; restraining the removal of the said Jonathan Berlin and Richard Berlin from the State of New York; and determining the appropriate conditions for the exercise of the visitation rights of respondent, and granting such other and further relief as the Court may deem just and proper; and respondent having appeared in this proceeding by his attorneys, Greenwald, Kovner, Goldsmith & Berger, and the matter having come on for hearing on June 22, 1965, and Greenwald, Kovner, Goldsmith & Berger having withdrawn as attorneys for respondent, and the firm of Corner, Finn, Froeb & Charles having been substituted as attorneys for respondent, and a hearing having been held on May 10, 1965 and certified copies of certain documents having been introduced,

Interim Order of the Supreme Court of the State of New York, County of Queens

Now, upon all the evidence adduced at the hearing, upon the motion of Brennan, London & Buttenwieser, it is hereby

ORDERED AND DECREED that nunc pro tunc, as of June 22, 1965, Barbara F. Berlin, now Mrs. Ernest Sands, is hereby temporarily awarded custody of the two children, Jonathan Berlin and Richard Berlin, who are the subject of this action.

Enter

/s/ PAUL BALSAM,
J. S. C.

Granted
May 16, 1966
PAUL LIVOTI
Clerk

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FILED
JUL 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 265

In the Matter of the Application of

BARBARA F. BERLIN,

Respondent,

For the Custody of JONATHAN BERLIN and RICHARD BERLIN,

—against—

JOSEPH G. BERLIN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

In the Matter of the Application of

BARBARA F. BERLIN,

Respondent,

For the Custody of JONATHAN BERLIN and RICHARD BERLIN,

—against—

JOSEPH G. BERLIN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Barbara F. Berlin opposes the petition of Joseph A. Berlin for a Writ of Certiorari to review (a) an order of the New York Court of Appeals, dated December 29, 1967, as amended, which modified an order of the Supreme Court of the State of New York, Appellate Division, Second Department, made on July 10, 1967; and (b) an order of the New York Court of Appeals made on April 10, 1968, to the extent that it denied a rehearing of the aforesaid appeal to that Court on the ground that since there is no constitutional issue involved herein, there is no reason to grant the Writ.

Statement

Petitioner and Respondent, who were married in 1954, lived in Maryland, just outside of Washington, D. C. until their divorce in September 1960 (R. 22, 23).

In April 1961, Respondent, who had been given custody of the children, moved to New York with her two sons, then aged 6 and 4. The separation agreement contemplated such a move since it contained a separate provision for visitation if Respondent did not live in the Washington area (Pet. Exh. 1, R. 96(a) 24).

Early in 1963 Petitioner brought a proceeding in Maryland to have Respondent held in contempt of court for her alleged failure to allow him to exercise his visitation rights ("Resp." Exh. B, p. 5, R. 108). Since it was not possible to serve Respondent personally within the State of Maryland as Respondent was neither present in, nor a resident or domiciliary of Maryland, the Maryland Court issued an order requiring Respondent to employ counsel in Maryland on whom service could be made ("Resp." Exh. A, p. 3, R. 106, "Resp." Exh. B, p. 5, R. 108, "Resp." Exh. D, R. 116). When Respondent failed to retain counsel on whom service could be made, the Maryland Court held Respondent to be in contempt of Court, ordered her arrest and incarceration and by an Order dated October 30, 1963, transferred custody of the boys to Petitioner ("Resp." Exh. B, p. 6, R. 108).

On September 25, 1963, Respondent filed a Petition in the Supreme Court of New York asking the Court to make the children wards of the New York Court and restraining their removal from New York. A proposed stay barring the removal of the boys from New York State was stricken from the order to show cause which was to be served on Peti-

tioner by registered mail (R. 9, 10). On October 30, 1963 following the Maryland award of custody to him, Petitioner came to New York with a detective and tried forcibly to remove the boys from New York (R. 48, 57). However, he was deterred from doing so, and the New York Court then granted the stay barring the removal of the children from New York State which Respondent had originally requested ("Resp." Exh. E, R. 20, 48).

After Petitioner had resorted to force to try and get the children into the jurisdiction of the Maryland Court, respondent retained counsel in Maryland to dispute Maryland's jurisdiction (R. 42). Both the Circuit Court and the Court of Appeals of Maryland decided the issue of jurisdiction against Respondent ("Resp." Exh. A, R. 106, 57).

In June 1965, after the Maryland Appeals Court had upheld the decision of its Circuit Court affirming Maryland's jurisdiction to modify its custody decree, the New York Court set down for hearing the issues raised by the Petition filed by Respondent herein in September 1963. Petitioner appeared in this proceeding, both by attorney and in person, filed an answer and testified at the hearing (R. 13, 16, 17, 54).

At the time of the hearing in New York in June 1965, Petitioner resided in Washington, D. C. (R. 54).

In testifying in New York Petitioner did not ask to be awarded custody of his children, but only requested that he be granted rights of visitation (R. 57, 59, 87).

The testimony revealed that the only time Petitioner had made any attempt to see his children between December 1962 and June 1965 was when he tried with the aid of a

detective forcibly to remove the children from New York State on October 30, 1963 (R. 43). The testimony further revealed the fact that Petitioner had made no effort to support his children and that the children were being supported by their stepfather who married Respondent in June 1963 (R. 48).

As a result of the hearing and a subsequent supplementary hearing, the Supreme Court of New York determined that the best interests of the children required that the custody of the children be awarded to Respondent, and ordered Petitioner to make regular payments toward their support (R. 5).

The Appellate Division of the Supreme Court of New York State upheld the lower Court's award of custody of and support for the children to the mother (Appendix to Petition 12a).

The Court of Appeals of New York also upheld the award of custody to the mother and the requirement that Respondent pay towards the support of his children. The Court held that it was clear from the opinion of the Maryland Court of Appeals that Maryland's award of custody to the father was subject to modification upon a showing that a change in custody would serve the best interests of the children, and that this was the precise reason why the New York Court had awarded the custody of the children to their mother (Appendix to Petition 4a). The Court of Appeals found also that, in the nearly three years between Maryland's award of custody to the father and New York's award of custody to the mother, circumstances had altered sufficiently to justify an examination of the custody question (Appendix 4a, "Resp." Exh. A, p. 10, R. 106).

Reasons for Denying the Writ

Petitioner claims that the issues in this case have not been resolved in prior Supreme Court cases which he cites, but an examination of those cases shows that Petitioner is in error. The issues he purports to raise here have all been previously determined by the very cases he cites.

In *New York ex rel. Halvey* v. *Halvey,* 330 U. S. 619 (1947), and in *Ford* v. *Ford,* 371 U. S. 187 (1962), this Court held that the full faith and credit which the Constitution requires a State to give to the decree of a Sister State is only that which the Sister State would give to its own decree.

An examination of Maryland law shows that Maryland authorizes the modification, amendment and reversal of its own custody decrees.

Maryland has specifically held in *Taylor* v. *Taylor,* 229 A 2 131 (Md. Court of Appeals 1967), that in Maryland an award of custody is always subject to modification. In that case, the Court reversed a lower court which felt that the Full Faith and Credit clause of the Constitution prevented it from considering a petition for a change in visitation which visitation had been ordered by the State of California twenty months earlier and amended within eight months of the Maryland petition. The Maryland Court of Appeals in authorizing a hearing to change the visitation rights and the amount ordered for the support of the children stated that an "infant child by virtue of his domicile has a right to the protection which may be afforded by the sovereignty under which he resides" (p. 135).

The Maryland Court of Appeals in *Taylor* v. *Taylor* felt impelled to distinguish its determination in that case from its determination in *Berlin* v. *Berlin* (210 A 2 380, "Resp." Exh. A, R. 106). Although in its summary of the facts in the *Berlin* case it erroneously stated that the boys were residents of New York when their mother was domiciled in Maryland, the Maryland Court said that it "made no attempt to rule that the court of the State of New York did not or would not have jurisdiction to decide custody by virtue of domicile" (p. 134). See also *Miller* v. *Miller,* 231 A 2 27; *Cornwell* v. *Cornwell,* 224 A 2 870; *Winter* v. *Crowley,* 190 A 2 87; *Naylor* v. *Naylor,* 143 A 2 604.

In *May* v. *Anderson,* 345 U. S. 528 (1953), this Court held that a custody determination made by a Court of a State in which the mother was neither a resident nor a domiciliary could not cut off her right to the custody of her minor children.

In *Kovacs* v. *Brewer,* 356 U. S. 604 (1958), this Court held that because a child's welfare is the controlling guide in a custody situation, a Court which is called upon to determine custody cannot be bound by a prior decree of another court, irrespective of whether "changes of circumstances" are objectively provable.

New York ex rel. Halvey v. *Halvey (supra)* also makes it clear that the decisions awarding custody are not *res judicata* as to those facts which were not presented to the first Court.

Petitioner tries to create a Constitutional issue by claiming that the New York Court of Appeals, in the instant case, having expressed itself on the issue of Full Faith and Credit as related to custody cases, in language that conflicts with the interpretation advanced by other States,

the Supreme Court should grant Certiorari for the purpose of making a pronouncement on the subject. We believe that there is no merit to this contention particularly as this Court prefers to decide only issues essential to the determination of the case before it.

Petitioner next makes the point that the Supreme Court should require Respondent to give up custody of her children as a punishment for her alleged contumacious conduct. Without arguing the merits of his allegations which are inaccurate and exaggerated, it seems sufficient to point out that this raises no Constitutional question warranting the Court's involvement.

Petitioner next raises the issue of change of circumstances, claiming that there have been none. This point appears to be adequately answered by the holding in *Kovacs* v. *Brewer (supra)*, and by the findings of fact made by the New York Court of Appeals in this case.

Petitioner's final point is that the New York Court of Appeals, in making an award of support for the children, has failed to give Full Faith and Credit to the Maryland decree which stayed Petitioner's obligation to pay Respondent for the support of his children. This attempt to create a Constitutional issue likewise fails since New York made its award as a result of the personal jurdisdiction over Petitioner and the obligation for support of one's children imposed by New York law under circumstances that differ from those in existence when the Maryland order was made (see also *Taylor* v. *Taylor* (*supra*)).

CONCLUSION

The petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 265

JOSEPH G. BERLIN,

Petitioner,

—against—

BARBARA F. BERLIN,

Respondent.

PETITIONER'S REPLY BRIEF

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No. 265

JOSEPH G. BERLIN,

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PETITIONER'S REPLY BRIEF

The Respondent's brief displays a notable lack of care or fairness in the presentation of both law and fact. It seeks to obfuscate the issue by (a) suggesting non-existent issues, (b) misrepresenting facts and the Petitioner's argument, (c) ascribing erroneous holdings to judicial decisions and (d) insinuating the Petitioner's unworthiness as a father—all to the end of contriving a showing that this case presents neither an issue nor a petitioner deserving of this Court's consideration. A somewhat lengthy reply is unavoidable, and the Petitioner begs the Court's indulgence.

Three Critical Factors Warranting Review

Despite the Respondent's tactics, there remain intact three critical factors, among others, which commend this case for review, namely:

1. The modified Maryland decree awarding custody to the Petitioner is beyond attack for want of jurisdiction.

2. Maryland gives *res judicata* effect to its prior custody decrees, in the absence of proof of subsequent events which so alter circumstances as to require a custody change for the child's welfare.

3. In the case at bar, there is no proof of subsequent events which would impel the Maryland court to reverse its modified decree and award custody to the Respondent.

It is the convergence of these factors that presents the question heretofore unresolved by this Court, namely, whether the Full Faith and Credit Clause is violated by the refusal of one State to accord a foreign custody decree the same effect it would receive in the rendering state.

Respondent's Use Of This Court's Decisions

The Respondent's use of this Court's decisions merely executes the design of her "Statement" (Resp. Br., pp. 2-4) which, by a miscellany of answerable observations, innuendos and references, labors to suggest that this case is garden variety. Thus, her postulate of changed conditions inspires reliance on *Kovacs* v. *Brewer,* although she affirmatively declines to demonstrate the presence of appropriate facts in this record (Resp. Br., p. 7). Her subtle suggestion of a jurisdictional infirmity in the Maryland proceeding (Resp. Br., p. 2) leads to a distorted use of *May* v. *Anderson.* The assorted comments in her "Statement", whose relevance the Respondent fails to show, would seem to explain her citation of *New York ex rel. Halvey* v. *Halvey.* And finally, she ignores this Court's specific disclaimers and interprets the *Ford* and *Halvey* cases as holding that a custody decree must be given the same faith and credit that it would receive in the rendering state. The Petitioner wishes it were so, but this Court has twice noted that it has consistently reserved decision upon

that question. *Kovacs* v. *Brewer,* at page 607; *Ford* v. *Ford,* at page 192.

Kovacs v. *Brewer* merely held that a custody decree is not entitled to receive greater effect than it would receive in the rendering state, assuming the applicability of the Full Faith and Credit Clause. The case was remanded to the North Carolina Supreme Court for clarification of its decision, this Court stating that if North Carolina "properly" found changed conditions "decision of the constitutional questions now before us would be unnecessary" (at page 608). Obviously *Kovacs* v. *Brewer* did not hold, as the Respondent asserts, that a custody decree is not binding "irrespective of whether 'changes of circumstances' are objectively provable" (Resp. Br., p. 6). Her labored interpretation is a tacit admission of the absence of changed conditions here.

New York ex rel. Halvey v. *Halvey* did not establish a national rule that a custody decree is not *res judicata* as to facts not presented in the rendering state. It held only that New York could consider facts not before the Florida court *because* under Florida law the Florida court could do so. *Ford* v. *Ford* merely held that a Virginia order dismissing a *habeas corpus* proceeding to fix custody, entered solely as a result of a settlement between the parents, would not have precluded a Virginia court from reviewing the facts and circumstances at the time of the consensual disposition and, therefore, would not preclude the courts of South Carolina. Lastly, *May* v. *Anderson* did not hold that a litigant may twice litgate the jurisdiction of the rendering state, as implied by the Respondent. There, the jurisdiction of the rendering state was contested for the first time in the forum state, and this Court simply applied the settled rule that a state is not bound by a decree made without jurisdiction. The Respondent makes no attempt to

dispute the rule established by *Sherrer* v. *Sherrer* and other cases cited by the Petitioner (Pet., p. 8).

None of the foregoing decisions apply here—not *May* v. *Anderson,* because Maryland's jurisdiction has been contested and sustained; not *Ford* v. *Ford,* because Maryland law requires proof of changed conditions (discussed *infra*); not *Kovacs* v. *Brewer,* because the decision of the New York Court of Appeals here was plainly not based on proof of changed conditions within the meaning of Maryland law (discussed *infra*); and not *Ford* v. *Ford,* because the modified Maryland decree here was specifically based on investigation and the exercise of judicial discretion.

Respondent's Use Of Maryland Decisions

The Respondent has not attempted to discredit the authorities cited by the Petitioner in support of his statement of Maryland law requiring proof of changed conditions (Pet., p. 8). Rather she obliquely suggests the contrary, as did the New York Court of Appeals, by making the broad assertion that Maryland decrees are modifiable in Maryland (Resp. Br., p. 5).

The Respondent attempts to support her implication that Maryland will freely modify its decrees regardless of changed conditions by citing *Taylor* v. *Taylor,* 246 Md. 616 (1967), by which she hopes to dilute the specific decree here involved because of the reference in that case to the case at bar. The *Taylor* case did not rescind the established Maryland rule requiring changed conditions. Indeed, it supports the Petitioner. Relying on *Kovacs* v. *Brewer,* the Maryland Court of Appeals held the chancellor erred in construing the Full Faith and Credit Clause as depriving him of jurisdiction even to entertain an application for modification of a Carolina decree, where the application was supported by detailed allegations of changed

circumstances which, if proven, would have justified modification under California law.

It is indisputable, of course, that Maryland decrees may be modified in Maryland. But the question, so assiduously avoided by the Respondent, is: "Under what circumstances?". Maryland's view is well illustrated in the cases cited by Petitioner (Pet., p. 8), in particular *Winter* v. *Crowley* which held there must not only be proof of a subsequent change in conditions "to justify a change in custody", but the change "must be one affecting the welfare of the child and not of the parent" (231 Md. 323, 331). The statement of the Maryland Court of Appeals in this case that Respondent was not foreclosed from reapplying for custody "when appropriate" must be read in light of Maryland law requiring changed conditions, and not as a license to disregard the modified decree because of disagreement with its conclusion, as the New York courts and the Respondent have concluded. It is likewise necessary so to read the observation concerning the case at bar in *Taylor* v. *Taylor, supra,* quoted by Respondent (Resp. Br., p. 6).

The Respondent's other citations of Maryland authority are equally unavailing to her. In *Miller* v. *Miller,* 247 Md. 358 (1967), the Court held that the Full Faith and Credit Clause applied to a Florida custody decree. The Petitioner hereby adopts that case in support of his ultimate position here. The Respondent's citation of *Cornwell* v. *Cornwell, Winter* v. *Crowley,* and *Naylor* v. *Naylor,* all of which were cited by the Petitioner (Pet., p. 8), is explainable only as an effort to diminish their adverse impact on the Respondent. They do not remotely sustain the Respondent's statement that precedes them. Indeed, the *Cornwell* case made it clear that a Maryland decree may be modified only "should subsequent events justify it in the best interests of the children" (244 Md. 674, 680). *Winter* v. *Crowley* held the same, as discussed above. And

the *Naylor* case held a Nevada decree was *res judicata* as to facts which existed when it was made, and that Maryland was therefore bound to give that decree the same effect it would receive in Nevada, upon the authority of *New York ex rel. Halvey* v. *Halvey* and *Kovacs* v. *Brewer*.

The Respondent has quite evidently failed to rebut the Maryland requirement of proof of significant changed conditions.

Absence Of Proof Of Changed Conditions

Confronted by her inability to demonstrate proof of changed conditions in this record, the Respondent substitutes a feigned confidence and claims reliance upon alleged "findings of fact" by the New York Court of Appeals (Resp. Br., p. 7). In doing so, she overlooks the fact that the Court of Appeals has certified the Constitutional question was "presented and necessarily passed upon" (Appendix, page 11a)—a most puzzling conclusion by that high court, if the Respondent is correct, in light of the holding in *Kovacs* v. *Brewer*. She also forgets that the Court of Appeals lacked jurisdiction to find facts because of the Appellate Division's affirmance on the custody question,[1] and that neither the Appellate Division nor the trial court purported

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[1] N.Y. CONST., Art. 6, § 3; see also, CPLR 5501 (b); *Gluckstern v. Gluckstern*, 4 N.Y.2d 521, 523 (1958); *Harrington v. Harrington*, 290 N.Y. 126, 131 (1943). The Court of Appeals has jurisdiction to review facts only in capital cases, or where the Appellate Division upon reversing or modifying a determination finds new facts and makes a final disposition—N.Y. CONST., Art. 6, § 3; see also, CPLR 5501 (b). Even in such limited cases the Court of Appeals will not make a new finding of fact, but will merely adopt the finding of one of the lower courts which is supported by the weight of evidence. *Matter of City of New York (Coogan)*, 20 N.Y.2d 618, 623 (1967); *People Ex rel. MacCracken v. Miller*, 291 N.Y. 55, 61 (1943). In rare cases it may remand to the court of first instance for further findings. *Harrington v. Harrington, supra*, (custody case).

to find changed conditions within the meaning of Maryland law. However, her recourse to the judicial action in New York warrants some further scrutiny of that action.

The Petitioner has noted the origin and purpose of the New York proceeding (Pet., p. 5), and the proof and events at trial (Pet., pp. 6-7). The trial court's opinion made no mention of changed conditions, but merely recited that the award to Respondent would serve the boys' best interests (Appendix, page 20a). This was anti-climactic. From the outset and before hearing most of the proof, the trial court made clear its preference for the Respondent—a New York resident.[2] When the Full Faith and Credit Clause was urged as a defense, the court replied it was "not too much impressed with this business of giving full faith and credit"—attributing its reaction to an extrajudicial suspicion (unsupported by the record) that the modified decree was the result of judicial chicanery, Maryland style (85-86). In short, the trial court flatly impugned the integrity of the Maryland courts and, unconcerned by constitutional limitation, executed its early preference for the party of the forum. This is the core of the New York result, unadorned by even a pretext at finding changed conditions.

The Appellate Division likewise made no pretense of finding changed conditions under Maryland law. It merely noted several "relevant facts" and vaguely concluded "it should not be held" that the trial court erred (Appendix, page 16a). Not only are those supposed facts both unsupported

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[2] The trial had barely begun when the court interrupted testimony and pressed the Petitioner to accept a settlement "appetizing" to the Respondent, namely, that Petitioner consent to the vacatur of the Maryland decree and all prior contempt orders, and agree to the Respondent's custody (R.35-37). The trial court repeated these efforts at the close of the proof (R.75-76).

and irrelevant to the Constitutional question,[3] but the Appellate Division's emphasis on its erroneous analysis of the Maryland proceedings confirms that its decision was prompted by sheer disapproval of the Maryland determination, and by nothing more. Because the Respondent chooses to misrepresent the Petitioner's position as seeking reversal to punish her for contempt (Resp. Br., p. 7), the error of the Appellate Division's statement should be demonstrated.

The record in Maryland conclusively shows that the change in custody was no mere penalty for the Respondent's final contempt. Were it otherwise, the contempt order dated August 27, 1963 would have simultaneously directed the custody change. It did not. It only directed an investigation with respect to the Petitioner's request for custody (Exhibit "B", R. 108). The order changing custody was not made until two months later after the result of the investigation was reported to the court, specifically finding that a change in custody would serve "the best interests and welfare" of the children (R. 111). The Appellate Division's observation (abandoned by the Court of Appeals) not only impeached the Maryland record, but unjustifiably

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[3] (i) The statement that the Respondent was "authorized" under the divorce decree to remove the children to New York was a flagrant and untenable repudiation of the contrary holdings of the Maryland Courts which are *res judicata* (page 8 of Exhibit "A", R. 106; R. 116-117). (ii) The Respondent's remarriage took place before the Maryland modification (R. 22)—hardly a changed condition. Moreover, there was no proof of what their home life is like. (iii) The lack of an interview of the children in Maryland is of no moment in light of the Respondent's wilful refusal to participate in the Maryland proceeding. Also, awards of custody are made daily without consultation with young children. Finally, the children were not interviewed in New York although readily available (R. 47). (iv) At the time of the New York hearing the Petitioner was only "temporarily" residing in Washingon, D. C. (R. 54); there is no proof of a change in his Maryland domicile since that finding was made in Maryland (R. 117); and in any event his residence at the time of the New York hearing has no bearing on the Constitutional issue.

assumed the Maryland court breached its duty under settled Maryland law.[4] Although it cannot be gainsaid that the Respondent's repeated invasions of her sons' rights of visitation with their father prompted Maryland's re-examination of her fitness for custody, that circumstance hardly justifies the notorious disregard of Maryland findings, Maryland law and the presumption of regularity. The Appellate Division's statement was not only unsupportable, but it ignored the harmful effects on children of a mother's persistent denial of reasonable association with their father—a factor of manifestly proper concern to the Maryland court. Clearly, the Appellate Division merely arrogated the prerogative to disagree with the Maryland courts.

There is little necessity for detailed consideration of the Court of Appeals' statement that "no one could seriously argue that, given the time which has elapsed since the prior decree was rendered, the age of these children and the fact that they never had actually been out of their mother's custody, a New York court or, for that matter, a Maryland court should or would accept as binding the previous finding awarding custody to the father" (Appendix, pages 52-62). The youth of these boys and the Respondent's continuous custody were squarely before the Maryland court. The bare fact of Respondent's *de facto* extension of that custody while frustrating the Maryland decree, unaccompanied by *evidence* of intervening events bearing on the childrens' welfare, would hardly impel the Maryland court to reverse itself. The Maryland Court of Appeals specifically refused

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[4] Maryland law holds: "The overriding consideration in determining to whom the custody of a child should be awarded is, we have consistently held, the best interests and welfare of the child." *Wallis v. Wallis*, 235 Md. 33, 36 (1964); see, also, *Ferster v. Ferster*, 237 Md. 548, 550-551 (1965); *Glick v. Glick*, 232 Md. 244, 248 (1963); *Mason v. Mason*, 228 Md. 387, 389 (1962); *Griggs v. Griggs*, 228 Md. 539, 541 (1962); *Bray v. Bray*, 225 Md. 476, 481 (1961); *Hild v. Hild*, 221 Md. 349, 351 (1960); *Burns v. Bines*, 189 Md. 157, 162-163 (1947).

to do so, and the New York Court of Appeals' contrary suggestion without analysis of Maryland law is open to review. The decision of the New York Court of Appeals plainly rested upon its declaration of the inapplicability of the Full Faith and Credit Clause (Appendix, page 3a), as further indicated by its emphasis on discretionary recognition of custody decrees and its ultimate statement that the question, in cases of this type, is not whether a parent is estopped from *"re-litigating the issue"* (Appendix, pages 4a-5a) (emphasis added). In any event a mere recital of changed conditions could not be binding here (Pet., pp. 8-9).

It is inconceivable that the Maryland court would vacate the modified decree upon this record. To regard this record as involving changed conditions, while entertaining the fiction that the Full Faith and Credit Clause applies, is to make a mockery of the Constitution. [See comments of Mr. Justice Frankfurter in *Kovacs* v. *Brewer* (at pages 614-615)]. The mockery is particularly abrasive in this case where the jurisdiction of New York depends entirely upon the childrens' presence wrought by defiance of the modified Maryland decree, with the assistance of an *ex parte* New York stay.

Respondent's Attempt To Prejudice Petitioner

Perhaps in due recognition of her untenable legal position, the Respondent burdens the Court with a campaign to stigmatize the Petitioner as a man of callous indifference to his sons. In critical terms, she refers to his effort to obtain his sons under the modified Maryland decree, his inability to see his sons after December, 1962, and his failure to make support payments. Besides the irrelevance of her comments, they are unfair and easily answered.[5]

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[5] Not only is there no stigma attachable to the Petitioner's effort in September, 1963 to implement the Maryland decision, but the fact is that he relented when confronted by force (R. 57). His inability

The fact is the Appellate Division found that the Petitioner is a fit father, and that finding was sustained by the Court of Appeals.

The Respondent's tactics include an attempt to convey the impression that the Petitioner is not interested in custody, the statement being made that he sought only visitation at the trial (Resp. Br., p. 3). That comment is a distortion of a statement of counsel during lengthy colloquy at the trial, is rebutted by the record (Pet., pp. 7-8) and the common sense of the situation, and is finally discredited by the fact that the issue was litigated in all New York courts.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

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to see his sons was first caused by the Respondent's contemptuous interference with his right of visitation, and after the modified Maryland decree he was advised by Maryland counsel to avoid a repetition of the unpleasant September, 1963 encounter pending the decision of the Maryland Court of Appeals (R. 19). The Petitioner's failure to pay support was directly caused by the Respondent's contempt, as a result of which the Maryland court made an order suspending his support obligation on March 27, 1963 (Exhibit "B", R. 108).